No. 11963

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

HERBERT A. JONES, JR.,
Appellee.

BRIEF FOR APPELLANT

On Appeal From
The District Court of the United States
For the District of Oregon.

HENRY L. HESS,
United States Attorney.

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JURISDICTION

This is a suit brought by the United States to rescind a sale of surplus property and to have it set aside as void, and for a declaration of the rights of the parties. The jurisdiction of the District Court rested upon Title 28, U.S.C., Section 41. Memorandum Opinion was rendered on February 20, 1948, denying the relief sought (R. 33), and on March 4, 1948, judgment was entered in favor of defendant and dismissing plaintiff's complaint (R. 38). Notice of appeal was filed April 30, 1948 (R. 39). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 225(a).

QUESTIONS PRESENTED

1. Whether a sale of certain surplus universal gear joints with a declared value (original cost) of $62,000.00 and a scrap value of $2,260.00 is void, where said gear joints were purchased with other property for a total purchase price of $75.00, which was determined by negotiation, and an apportioned purchase price of the gear joints of $69.13, where the agent of the War Assets Administration negotiating the sale had authority to close sales on a bid basis of property of a declared value of not more than $50,000.00, where such sale was approved by an agent of the War Assets Administration having authority only to approve sales on a bid basis for property of a declared value of not more than $100,000.00, and where the agent intended

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Insert for BRIEF FOR APPELLANT (To be inserted at Page 16 preceding "ARGUMENT")

SPECIFICATION OF ERRORS

The District Court erred—

1. In making Findings of Fact insufficient to resolve any of the issues raised in the pleadings and pre-trial order and tried.

2. In making Findings of Fact which do not support its Conclusions of Law.

3. In dismissing the action for want of equity.

4. In holding and concluding the plaintiff not entitled to the relief prayed for.

5. In holding and concluding the plaintiff not entitled "to rescind said sale".

6. In holding and concluding, if it so held and concluded, that the transaction between the defendant and the plaintiff's agents resulted in a valid sale.

7. In holding and concluding that the plaintiff was not entitled to a decree declaring the rights and duties of the defendant and the plaintiff under and by virtue of any agreement arising under transactions between defendant and plaintiff's agent or agents.

8. In holding and concluding that the plaintiff was not entitled to a declaration by the Court that the purported sale be void and the plaintiff owner of the property purportedly to have been sold.

9. In holding and concluding that the plaintiff was not entitled to a decree by the Court vacating, setting aside and rescinding the purported sale between the defendant and the plaintiff.

10. In making Findings of Fact and Conclusions of Law which do not clearly show basis for the decision.

to approve a "bid" sale as shown on the sales memorandum on which he signified his approval.

2. Whether the sale of surplus property by agents of the War Assets Administration for $75.00, which included certain new universal gear joints of a declared value (original cost) of $62,553.45 and a scrap value of $2,260.00 should be rescinded in whole or in part, where the buyer knew the nature and use of the gear joints (R. 139), and knew the gear joints contained a high percentage of bronze, the approximate weight of the gear joints and the approximate worth of the bronze (R. 146), and where the agent making the sale thought the gear joints were automotive equipment and not marine equipment (R. 84).

3. Whether the United States is entitled to a decree, declaring the rights and duties of the United States and the appellee, which arose out of transactions between agents of the War Assets Administration and the appellee, which transactions the appellee claims resulted in the sale of surplus property and where the United States maintains the sale was void or voidable.

4. Whether there is sufficient evidence in the case warranting the Court's dismissing the government's suit for want of equity.

5. Whether the findings of fact and conclusions of law resolve the issues raised by the pleadings and pre-trial order

and show the basis for the decision and whether the findings of fact support the conclusions of law.

STATEMENT

This is an appeal from a judgment in favor of the appellee in a suit brought by the United States to set aside and rescind a purported sale of surplus property by the War Assets Administration to the appellee, on the grounds of mutual mistake, unilateral mistake and want of authority, and also praying for a declaration of rights and duties of the parties (R. 2-27, 38).

The suit was tried upon issues set out in a pre-trial order, which was not signed by the Court (R. 48), although the Court said at trial that the pre-trial order would be signed (R. 51). The pre-trial order was signed by counsel and submitted to the Court but was not forwarded to the Circuit Court of Appeals by the Clerk of the District Court as part of the transcript of record. The pre-trial order, as submitted, is set out in the Appendix, *infra,* pp.....

The facts as agreed in the pre-trial order may be summarized as follows:

In May or June 1946, certain universal gear joints, described as Lot Nos. 27, 28, 29 and 30 in plaintiff's Exhibit No. 1, were declared surplus property to the War Assets Administration by the United States Maritime Commission,

and later, the War Assets Administration undertook to dispose of the universal gear joints under the Surplus Property Act and regulations and orders promulgated thereunder. The universal gear joints were designated for disposition by the Automotive and Machinery Sales Division of the War Assets Administration, which listed the universal gear joints with other property upon Special Offering C-286 (plaintiff's Exhibit No. 1). The special offering was circulated to persons dealing in hardware, machinery, farm implements and scrap, and to interested veterans who had placed their names of record, but bids were invited thereon. The gears were fully described in the special offering and were shown to be located at Oregon Shipbuilding Corporation, Portland, Oregon. However, no bids were received on the universal gear joints and other items. The residue of unsold items were Lot Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32. Besides the universal gear joints, the residue consisted of one dump truck body (item 1), 12 brass plug coils (item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32). The Special Offering No. C-286 was dated October 4, 1946 and called for sealed bids to be received by the War Assets Administration office, Portland, Oregon, by 2:00 P. M., October 24, 1946 (plaintiff's Exhibit No. 1). On or about October 30, 1946, the appellee made an inquiry of a salesman of War Assets Administra-

tion as to whether there were any jeep motors for sale and was informed that there were available for sale two jeep motors but it would be necessary to purchase the entire unsold residue of Special Offering No. C-286 (plaintiff's Exhibit No. 1). After considerable discussion, the salesman offered to sell all of the residual items to the appellee for $75.00 and the appellee agreed to buy these items at that price and later paid the sum of $75.00 to the War Assets Administration.

A sales memorandum, Form WAA-2a (plaintiff's Exhibit No. 3), was later issued to the appellee covering the purported sale. The appellee was permitted to take delivery of all of the residual items, excepting Lot Nos. 27, 28, 29 and 30, being the said universal gear joints. The War Assets Administration and United States Maritime Commission refused delivery to the appellee of the said universal gear joints when demand was made for delivery thereof on or about November 12, 1946. On or about September 26, 1947, at the time of filing the complaint herein, the United States tendered to the appellee the sum of $69.13, being that portion of the sale price apportioned to the universal gear joints, which tender was rejected by appellee and paid into the registry of the District Court of the United States for the use of the appellee.

Other facts pertinent to the case are as follows:

The original complaint was filed on September 26, 1946,

asking only for rescission of the sale upon the ground of mutual mistake (R. 2-18). With leave of the Court on December 4, 1947, the United States of America filed an amended complaint, seeking to rescind and set aside the sale on the grounds of (1) mutual mistake, (2) unilateral mistake, (3) lack of authority by agents negotiating sale, and (4) sale of such an unfair price was in violation of the Surplus Property Act of 1944, and hence beyond the power of War Assets Administration's agents. Each of the foregoing grounds was set forth in a separate cause of action, the first cause of action being identical with the original complaint. In addition to a decree requesting rescission of the aforementioned purported sale, apparently referring to the entire sale—the amended complaint prayed for "a declaration of the rights and duties of the parties hereto under and by virtue of any agreement arising under the aforementioned transaction between the plaintiff's agent or agents and the defendant". In the second cause of action, it was alleged that tender of the full purchase price of the purported sale would have been futile.

The case went to trial upon the facts and issues as set out in the pre-trial order, Appendix, *infra,* pp. ....., on December 22, 1947. The relief prayed for in the pre-trial order, which stated that said order superseded pleadings, was for the declaratory relief as requested in the amended complaint, rescission of the entire sale, and that the appellee

be reimbursed in the sum of $75.00 and that all items delivered to appellee by appellant be restored to appellant; or, in the alternative, "if defendant is put to a hardship to restore the parties to status quo by a redelivery to plaintiff of the items delivered to him, then, if defendant elects to retain all items delivered, defendant should be reimbursed in the sum of $69.13, the amount paid by him for the said Universal Gear Joints."

The bills of sale and WAA's memoranda of the transaction, Form WAA-2a, were given in evidence. Separate sales memoranda and bills of sale were prepared for each of the items included in the sale except the gear joints, one sales memorandum and bill of sale being prepared for all of the gear joints. All of the bills of sale, except that covering the dump truck body, and all sales memoranda, except the sales memorandum relating to the gear joints, state on their face: "Following Sales memo numbers on attached WAA-2's constitute one complete lot at a total selling price of $75 (numbers of all sales memos included in sale.)" The apportioned prices of the various items computed according to their respective declared values appear on the respective bills of sale and sales memoranda, the price shown for the gear joints being $69.13. (Plaintiff's Exhibit No. 3 A to I).

Upon being refused delivery of the universal gear joints, the appellee, Jones, notified War Assets Administration

that he was engaging an attorney to protect his interest (R. 114). Mr. C. T. Mudge, Regional Director of War Assets Administration, Portland, Oregon, on December 4, 1946 addressed a letter to Neal W. Bush, who was the appellee's attorney, notifying the appellee that the War Assets Administration was rescinding the sale (Defendant's Exhibit No. 18).

The appellee, Jones, testified that he had first been offered by telephone the residual items which remained unsold in Special Offering No C-286 for $900.00, later for $250.00, and on the date of sale for $75.00. Jones' first conversation on the date of the sale when he appeared in person at the War Assets Administration office was with one D. F. Webb, a clerk-typist in the Automotive and Machinery Division. He stated to Webb his main object was to obtain the jeep motors and was informed by Webb it would be necessary for him to take all the residual items in order to purchase the jeep motors. Webb went over the description of each item on the Special Offering No. C-286 with Jones, pointing out the residual items (R. 127-129).

Webb's testimony was that the original decision that the residue should be sold in a lot was made by one Williams, Chairman of the Board of Awards, who had charge of opening the bids in the first instance. Williams fixed no price but directed the lot be sold for the best price which could be negotiated (R. 73, 215). Webb had no authority

to make the sale and referred Jones to William J. Burgoyne, Acting Chief of the Automotive Division, who concluded the sale with him (R. 70, 130). Burgoyne was unable to remember all of the details of his conversation with Jones (R. 90).

It was the testimony of both Webb and Burgoyne that they were unfamiliar with marine equipment of this type and that they thought from the description of the universal gear joints that it was automotive equipment, particularly since it had been referred to the Automotive and Machinery Sales Division for sale (R. 68, 69, 86, 223).

Jones testified that he had had experience in a shipyard and had, prior to the sale, installed gear joints of this type and knew their nature; that they were not manufactured "very cheaply because of their nature"; that he knew the universal gear joints contained a high percentage of bronze; that he knew the approximate weight of the gear joints and the approximate worth of the bronze (R. 129, 130). Webb testified that in his conversation with Jones concerning taking all of the residual items rather than just the two jeep motors, Jones told him that he did not want to buy a "bunch of junk". There was no specific reference as to what Jones meant by "junk" but Webb, from the conversation, understood it to mean the items other than the jeep motors (R. 68, 69, 220-222).

After the purported sale was consummated by Mr. Burgoyne, Mr. Webb instructed a typist to fill out the bill of sale and memorandum of the transaction, Form WAA-2a (Plaintiff's Exhibit 3 A to I) (R. 74). Although Mr. Burgoyne did not recall the details of the transaction at the time, he stated that it was the office procedure that Form WAA-2a was referred to Louis A. Zanon, Acting Assistant Deputy Regional Director (R. 90, 91, 118, 119). The Form WAA-2a (Plaintiff's Exhibit 3 A to I) shows the signature of Louis A. Zanon as having approved the sale.

The War Assets Administration, at the time of this purported sale, had three different methods of selling goods—fixed price sales, sales with prices based on competitive bidding and sales where the price was fixed by negotiation. C. T. Mudge, Regional Director of the Portland office, testified that the authorizations given by him to the members of his staff were limited to sales made on a fixed price or bid basis and that he alone had authority to execute a sales contract where the price was determined by negotiation with the buyer (R. 163). Where a sale was offered by bid, the price at which the commodity was sold was determined by the Board of Awards, which determine the successful bidder in accordance with upset prices. Where the sale was fixed price, the price of the commodity was previously fixed by the Board of Awards or Regional Director (R. 58, 114-116, 124).

Mudge testified that his agency was discouraged in the making of negotiated sales and that negotiated sale procedure was "hemmed in with countless regulations"; that it had to pass through "the Regional Review Board and Board of Allocation Awards, and so forth, and finally comes up to the Regional Director for final approval" (R. 163).

Zanon testified that since the face of the form of bill of sale, Form WAA-2a (plaintiff's Exhibit No. 3 A to I), indicated that the type of sale was *bid* upon Special Offering No. C-286 (Plaintiff's Exhibit No. 1), he authorized the sale of the material on a bid basis under a regular procedure of a competitive bidding program, and had the form shown the sale to be "negotiated", he would have inquired into the transaction (R. 111, 112, 119). He also stated that that form indicated to him that the price had been determined under the normal procedure by the Board of Awards (R. 111). As to the value of the universal gear joints at the time of the sale, the appellee testified that he did not know the exact value but did know the approximate weight of the gears, the approximate worth of the bronze and that the gears contained a high percentage of bronze (R. 129, 130). Zanon testified that the gear joints contained a high percentage of brass or bronze and according to his computation, the scrap value of the universal gear joints at the time of the sale was $2,260.00 (R. 109, 118). Upon cross-examination, Zanon testified that since the

scrap value was $2,260.00, it would not have been necessary for the War Assets Administration to sell the universal gear joints at a price less than the scrap value. Zanon also testified that when conversing with appellee Jones after the government had refused delivery, Jones told him he had purchased $60,000.00 worth of equipment for $75.00 and that he knew at the time of the sale that he was getting an exceptional bargain (R. 113-114). Jones stated, however, that the figure of $60,000.00 was used as the amount he was advised was the cost to the government of the universal gear joints (R. 136).

The Court excluded evidence showing that it was the custom and practice of the War Assets Administration regional office to sell property at prices a fraction of the cost and value (R. 77). However, some evidence was admitted to show the custom and practice on the issue of appellee's good faith (R. 166).

On February 20, 1948, the Court rendered a written Memorandum Opinion as follows (R. 33):

> "Seeking to avoid the difficulties attendant on rescission of a sale of personal property, where partial delivery has been made, the plaintiff insists that this contract is severable. But it is not severable. On the contrary, it was a sale by lot, and the seller insisted that it be that way. The relief sought is, therefore, denied."

On March 1, 1948, the Court entered Findings of Fact

and Conclusions of Law (R. 33-38). The Court found that the War Assets Administration issued instructions that the residue of the Special Offering No. C-286 (Plaintiff's Exhibit No. 1) "be placed on sale at the best price offered; and a reasonable test of the market had been made by the plainitff before said goods were sold to defendant" (R. 34); that at the time of the sale, both appellant, its agents and appellee were familiar with the nature of these items (R. 34); that "there is no substantial evidence to establish the value of said items at the time of the sale other than that the value of said items and in particular of said universal gear joints, was substantial, but that the exact value of said goods was questionable and speculative, which said facts were recognized both by plaintiff, its agents, and defendant and all of said negotiations, including the determination of said price and their subsequent sale, were the deliberate and intentional acts of plaintiff, its agents, and defendant, and the means of information as to the value of said goods were open alike to all of said parties" (R. 34, 35).

The Court found further that "no mistake was made by either plaintiff, its agents, or defendant as to the identity, nature or value of said items, nor was there any mistake that determined the conduct of either plaintiff, its agents, or defendant, nor did defendant have any knowledge or reason to know that plaintiff or its agents made any such mistake or lacked authority to make said sales"; that the

appellee acted in good faith at all times; that on November 6, 1948, WAA "executed and delivered" to appellee a "bill of sale purporting to transfer title of" all said items (R. 35).

The Court also found that appellant delivered all of the items other than the universal gear joints to the appellee, continuing to deliver other items to him after it had refused to deliver the universal gear joints; that the "sale was not severable, but by choice of plaintiff all of said items were sold at a single lot"; that appellant, at the time of filing the original complaint tendered to appellee the apportioned purchase price of the gear joints, but has not tendered the balance of the purchase price paid for the other items; that "it has not been shown that defendant is still in possession of said items; that it would be possible to restore the status quo or that defendant would not be prejudiced by (rescission of the entire sale)." (R. 36, 37.)

Further, the Court found that on December 28, 1946, the appellee filed action for replevin in the state court against the Regional Director of War Assets Administration, and the custodian of the universal gear joints and that the goods were removed immediately "by plaintiff's agents" to the State of Washington and were moved to a military reservation after the custodian had been joined as party defendant in the state suit (R. 36).

The conclusions of law of the Court were that "plaintiff

is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein, and the action should be dismissed for want of equity". (R. 37, 38).

Judgment was entered for the appellee on March 4, 1948, dismissing the appellant's complaint (R. 38).

ARGUMENT

I

Sale of universal gear joints was void ab initio because the employees and agents of the War Assets Administration who negotiated with appellee and the officer making the approval were without authority to act.

A. There was no specific authority given to the agent dealing with appellee to make the sale of the universal gear joints.

The uncontradicted evidence showed that only Mudge had authority to make a negotiated sale; that the authority delegated to his subordinates was limited to sales on a bid or fixed price basis. (R. 58, 114-116, 124, 163.) Clerk Typist Webb, with whom appellee Jones first talked concerning the universal gear joints and the other residual items had no authority to make any sale and Burgoyne, Chief of the Commodity Branch, was limited to making sales on a fixed or bid basis to the amount of $50,000 declared value. (R. 60, 82, 163.) The declared value of the goods in this case, universal gear joints, was over $62,000. (R. 56.) The

authority of Deputy Regional Director Zanon, who approved the sale, was limited to $100,000 declared value upon sale where the price was determined on a bid or fixed price basis. (R. 61.)

It is elementary that an agent who is authorized to sell property in a specific manner as by bid has no authority to sell it in any other manner. (Mecham Agency, 1914, Sec. 858.) The law is settled that the United States can be bound only by its agents acting within the scope of the authority to them and that persons dealing with agents of the United States do so at their own risk that the agents are acting strictly within their authority. All persons are charged with notice of limitation of the agent's authority. *Utah Power & Light Company v. United States,* 243 U. S. 389; *United States v. City and County of San Francisco,* 310 U. S. 16, 54 Am. Jur., United States, Section 92.

The evidence showed also that Deputy Regional Director Zanon did not intend to authorize and in fact could not have authorized a negotiated sale when he signed Form WAA-2A, but a bid sale. In fact, Zanon testified that if he had thought it was a negotiated sale he would have inquired into the matter to determine how it was made. (R. 111, 112, 119.) The Government was not bound by the ratification or approval of Zanon since he had not ratified a bid sale and did not have knowledge of all the facts upon which the unauthorized action of Burgoyne was taken. If Zanon had

had authority to ratify and approve a bid sale it would have to be with full knowledge of the facts.

> "The rule that where the agent has acted without authority, and it is claimed that the principal has thereafter ratified this act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken, is applicable to the government as to an individual." 54 Am. Jur. United States, Section 92 (See *United States v. Beebe,* 180 U. S. 343).

B. Sale was invalid because agent could not make sale at such an unreasonable price.

Apart from the above consideration of invalidity because of want of authority, it would appear that the sale was invalid because made at such a grossly inadequate price. Provisions of Section 2 of the Act, 50 U.S.C. App. Sup. V., Sec. 1611, are that surplus property should be disposed of at fair prices to prevent unusual and excessive profits being made out of surplus property and to obtain for the Government as far as possible a fair value of surplus property upon its disposition. (Appendix, *infra.* pp.....). A contract of purchase entered into by a Government agent providing for payment of a price which is grossly unconscionable is not binding on the Government. *Hume v. United States,* 132 U. S. 406. An agent to sell for private principal, if no price has been specified, has no authority to sell for less than the market price or if there is no market price for

less than a reasonable price. Restatement of Agency, Section 61.

Although the Government did not offer any evidence as to the market value of the universal gear joints at the time of the sale, it is clear from the evidence of Zanon that had these new universal gear joints been sold for scrap the value at that time was $2260.00 if sold for scrap. (R. 109, 118.) The appellee testified that in his state court action for replevin he gave the value of $31,000.00, retail, and $6,000.00 scrap value of the universal gear joints. (R. 153.) The sale by an agent for $75.00 of machinery of this type after an unsuccessful attempt to dispose of it in a single offering by bid sale, when the principal has indicated to him that when it was new it cost over $60,000 and was worth that amount, would appear to be so extraordinary a transaction as to be unauthorized as a matter of law.

> "Individuals, as well as Courts, must take notice of the extent of the authority of officers of the Federal Government. When dealing with such public officers, one should inquire into their powers and authorities to bind the Government, and is held to a recognition of the fact that Government agents are bound to *fairness* and *good faith* as between themselves and their principal." (Emphasis added) 54 Am. Jur., U. S., Sec. 92.

II

The sale of new universal gear joints of the original cost and declared value of $62,553.45, and a scrap value of $2260.00, should be rescinded where the buyer knew the nature and use of the gear joints and knew the gear joints contained a high percentage of bronze, approximate weight of the gear joints, and approximate worth of the bronze, and where the agent of the War Assets Administration negotiating the sale thought that the gear joints were automotive equipment and not marine equipment and did not know their true value.

The original complaint in this case (R. 2) alleged that there was a mutual mistake and that the sale of the universal gear joints should be rescinded on that ground. However, at pre-trial conference the defendant for the first time put the Government on notice that he knew the nature and value of the universal gear joints. (R. 103.)

The mistake on the part of the Government's agents was that they did not know the nature or the value of the universal gear joints when they were sold to appellee Jones, while on the other hand Jones knew the nature and value of the goods. The mistake of the Government agents was material to the transaction because the universal gear joints would have not been sold at such a grossly inadequate price had the agents been aware of the value of the goods. (R. 119.)

> "There are two requisite essentials in the exercise of equitable jurisdiction in giving any relief, defensive

> or affirmative. The facts concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely as incident; and the mistake itself must be so important that it determines the conduct of a mistaken party or parties." 3 Pomeroy's Equity, Juris. Prud. (5th ed., 1941) 333, Sec. 856. (See 9 Am. Jur, Cancelation of Instruments, Sec. 32; *Cleavland v. Richardson,* 132 U. S. 318.)

Where the buyer knows or suspects, or has reason to know the mistake of the seller, restitution is granted if the fact as to which the mistake is made is one which is at the basis of the transaction. Restatement of Restitution, Sec. 12, Comment C: See Restatement of Contracts, Sec. 503, Comment A. Mistake as to price and value is material. Restatement of Restitution, Sec. 16, Comment C.

> "Where a party knows or has reason to know that another party has made a basic mistake, restitution is granted. This situation has frequently arisen where there has been an error in the price given. In this case, recission is ordinarily allowed." Notes on Restatement of Restitution, Sec. 16, Commet C. (See: Moffet, Hodgkins & Clark Co. v. Rochester, 178 U. S. 373.)

The illustration under Comment C of Section 12 of the Restatement of Restitution is clearly in point in this case as a basis for setting aside this purported sale for a unilateral mistake:

> "A, looking at cheap jowelry in a store which sells both very cheap and expensive jewelry, discovers what he at once recognizes as being a valuable jewel worth

not less than $100.00, which he correctly believes to have been placed there by mistake. He asks the clerk for the jewel and gives 10c for it. The clerk puts the 10c in the cash drawer and hands the jewel to A. The shopkeeper is entitled to restitution because the shopkeeper did not, as A knew, intend to bargain except with reference to cheap jewelry."

"The following seems to be the true rationale of the doctrines concerning inadequacy of price: Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion or reason for interference by the courts * * *. But where there is no evidence of knowledge, intention, or deliberation by the parties, the disporportion between the value of the subject-matter and the price may be so great as to warrant the Court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disporportion would call for explanation, and will shift the burden of proof on the party seeking to enforce the contract, and will require him to show affirmatively that the price was a result of a deliberate intentional act of the parties; and if the facts do prove such action, the fact of fraud will be more readily and clearly inferred." 3 Pomeroy's Equity, Juris. Prud. (5th Ed.), Section 927, p. 637.

One of the best formulation of the rule that recission will be granted where there is a unilateral mistake as to price is stated in the case of *Hardman Lumber Co. v. Keystone Manufacturing Company* (W. Va. 1920), 103 S. E. 282. There one lumber dealer, the plaintiff, requested and received from another lumber dealer, the defendant, the

quotation of price on a quantity of lumber to be furnished by the plaintiff to a third party. The quotation was computed on the basis of surface measurements, which represented standard practice in trade. But the contract of sale and contract of resale both called for actual measurements, and the error was oversight, caused by the unusual aspects of computing on the basis of actual measurement. The Court reversed the judgment for the plaintiff, ruling that the price was sufficiently in variance with the correct quotation to constitute notice to the plaintiff that there was error, and holding that where a mistake is so obvious, the other party must know this, or where the surrounding circumstances are such as to give notice, or where there is actual notice that an offer is made under misapprehension of a material fact, no contract will lie. It is submitted that this is a sound and practical application of the basic contract principle which prevents formulation of a valid and binding contract where one part snaps up an offer that is obviously made in error. See, *Lange v. United States* (CCA 1941), 120 F. 2d 886.

III

The United States is entitled to a decree declaring the rights and duties of the appellee and the Government under and by virtue of any agreement arising under transactions between the appellee and the appellant's agent or agents.

Title 28, United States Code, (1941, Section 400) provides:

> "(1) In cases of actual controversy (except with respect to Federal taxes) the Courts of the United States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Remedy of the Declaratory Judgments Act is properly used where a public authority seeks a declaration that the contract entered into by it was void or voidable. Borchard Declaratory Judgments, (2d Edition, 1941) 1004. In this instance the United States seeks to have set aside or rescinded a contract sale purportedly entered into between agents of the War Assets Administration and appellee Jones. The requirement of the existence of a case or controversy in suits in a federal court under the Declaratory Judgments Act is whether the facts alleged show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Casualty Co. v. Pacific Coal & Oil Company, et al.* 312 U. S. 270, 273.

> "The Congress having conferred upon Federal Court's power to grant declaratory relief in an appropriate case, the right to it is not lightly to be denied. * * * The remedy of a declaratory judgment will be refused, granting the Court has discertion to decline it,

only if it will not finally settle the rights of the parties. *Aetna Casualty Insurance Co. v. Quarles,* 4 Cir., 92, F. 2d 321." *Maryland Casualty Co. v. Faulkner et al.* (CCA 6, 1942), 126 F 2d 175, 178.

The District Court in its Findings of Fact and Conclusions of Law made no statement of why declaratory relief was refused in this case. (R. 33-38.) The Conclusions of Law simply stated, "Plaintiff is not entitled to rescind said sale or to the other relief prayed for by plaintiff herein and the action shall be dismissed for want of equity." (R. 37.) Declaratory relief was prayed for in the amended complaint (R. 27) and also in the pre-trial order. App. *infra,* pp.....

IV

The District Court erred in dismissing the action for want of equity.

A. The ground assigned by the District Court for the decision "difficulties attendant" upon recission of an entire sale of personal property where partial delivery has been made, is untenable.

The fact that partial performance was made by the Government would appear material only insofar as it may afford

the defendant defense that the parties cannot be equitably restored to the status quo, or the defense of ratification.

Assuming that the first of these defenses is applicable to the United States, there was nothing in the circumstances indicating that substantial restoration could not be effected by the decree directing the defendant to return the goods delivered to him on the appellant's tender of the purchase price. The burden of proving such a change in circumstances as would cause him loss, or render it inequitable to require him to make restoration was on the appellee. Restatement of Restitution, Section 142, Comment G. No such circumstances were proved by the defendant.

Further, a change in circumstances would appear to be no defense in a suit of the United States for setting aside the sale as void on the facts presented. Since the defendant acquired the goods as the result of unauthorized acts of Government agents, the goods remained the property of the United States.

The Court found that the plaintiff continued to deliver goods to the defendant after delivery of the gear joints was refused. Neither this fact nor the failure of the Government to make prompt tender of the entire purchase price was a ratification of the sale. The agents representing the Government had no authority to accept or retain the purchase

price or to make any deliveries to the defendant, and their doing so does not bind the Government. (Cf. *Wisconsin Central Railroad v. United States,* 164 U. S. 190, 210, 212.

If the Government established grounds for recission are setting aside the sale the contingencies that defendant had disposed of any of the goods could have been met by a decree providing that if he was unable to return any of them the amount of the plaintiff's tender should be reduced by this value; and the Court could retained jurisdiction for the purpose of ascertaining such value. *Warner v. Daniel,* 1 Woodbury and N. 90 (CCMASS.) The government consented in the pre-trial order to a decree charging the defendant with the apportioned contract price of any goods he was unable to return. The apportioned price of the goods delivered to him totaled $5.87 (R. ....)

B. Tender before suit for recission or asking that contract be set aside is not necessary.

"However, as a general rule an actual tender is not essential to equitable relief where the party offers to do equity in his bill." 30 CJS, Equity, Section 91.

Since a court of equity can impose restitution as a conditioned precedent to its relief, there is no necessity for a preliminary offer to restore what the plaintiff has received. 5 Williston on Contracts (Rev. Ed.) Section 1460 and 1460A. The right of a person to restitution for a benefit

conferred upon another in a transaction which is voidable for fraud or mistake is not dependent upon his return or offer to return to the other party anything which he received as a part of the transaction. Where such thing consists of money which can be credited, restitution is granted. (Restatement of Restitution, Section 65.) The plaintiff asked in the pre-trial order that the defendant be reimbursed for the sum of $75.00, $69.13 of which was previously tendered and that all items delivered to the defendant by plaintiff be restored to plaintiff, or in the alternative, if the defendant is put to a hardship to restore the parties to status quo by a re-delivery to plaintiff of all the items delivered to the defendant, but if the defendant so elects to retain all items delivered, then he should be reimbursed in the sum of $69.13, the amount paid by him for the said universal gear joints. (App. *infra.* pp.....). It is clear from the case that tender of less than the amount of $75.00 did not prejudice the appellee in any manner and in fact tender of the full amount would have been futile.

C. Acts of agents of Government in moving universal gear joints from the State of Oregon into the State of Washington will not bar the relief prayed for by the Government.

The Court sets out in its findings of fact (R. 36) that the goods were moved by the Government agents into the State of Washington after a replevin action had been filed against the Director of the War Assets Administration, in

the Oregon State Court. It is a general rule that the United States is not bound or estopped by acts of its agents, which the law does not sanction or permit. (*Utah Power & Light Co. v. United States,* 243 U. S. 389, 408; 54 Am. Jur. U. S., Section 124).

There was no evidence introduced in the case that these gear joints were removed from the State of Oregon into the State of Washington or the circumstances concerning the case in the state court, except that the pleadings in the Circuit Court of the State of Oregon were offered in evidence and objected to by the Government. (R. 178.)

V. Findings of Fact and Conclusions of Law do not resolve issues raised by the pleadings and pre-trial order nor show the basis for the decision; and the Findings of Fact do not support the Conclusions of Law.

Rule 25 of the Federal Rules of Civil Procedure requiring the trial court to find facts specially and state separately in conclusions of law is mandatory. *Application of Murra,* 166 F. 2d 605; *Hill v. Ohio Casualty Insurance Company,* 104 F. 2d 695. To comply with the rule it is important that:

> "* * * the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion." *Matton Oil Transfer Company v. The Dynamic, et al.,* 123 F. 2d 999, 1001; *United States v. Forness,* 125 F. 2d 928, 942.

> "To be sure, the primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide the basis for purposes of decision. *Schilling v. Schwitzer-Cummins Co.,* 142 F. 2d 82." *Shapiro v. Rubens,* 166 F. 2d 659, 665.

The Findings of Fact and Conclusions of Law do not resolve the issues which were raised in the pre-trial order and the pleadings and tried. The issues raised are set out in the pre-trial order. (Appendix, *infra.,* pp.....)

A. The Conclusions of Law do not set out that there was a valid sale arising out of the transactions between Appellee Jones and agents and employees of the War Assets Administration.

The statement "plaintiff is not entitled to rescind *said sale"* might infer that the Court concluded there was a valid sale, but it is not clear from the Findings of Fact and Conclusions of Law whether the Court had determined that there was a valid sale. The issue of the validity of the sale was not resolved by the Court.

B. The Conclusion that the declaratory relief prayed for should be denied is not supported by findings of fact.

There are no statements in the findings of fact which would be the basis for the conclusion that the relief prayed for in asking a declaratory decree of the rights and duties of the parties under a transaction arising out of the negotia-

tion between the appellee and agents of the War Assets Administration should be denied. The argument that the District Court should have granted declaratory relief is set out above.

VI

The findings of fact are clearly erroneous.

A. Paragraph I of the findings of fact stated:

> "Said War Assets Administration then issued directions that this residue be placed on sale at the best price offered."

There is no evidence that anyone having authority to sell the universal gear joints placed them on sale for the best price offered. On the contrary it was shown by the testimony of C. T. Mudge, Regional Director, that he was the only one authorized to make a negotiated sale. (R. 163.) Clerk Typist Webb's testimony was that Mr. Williams, Head of the Awards Committee, had authorized this residue which included the universal gear joints to be sold for the best price obtainable, (R. 73, 215) but from the uncontradicted testimony Mr. Williams had no authority to make a negotiated sale nor to authorize anyone to make such a sale.

B. Paragraph I of the findings of fact stated:

> "A reasonable test of the market had been made by plaintiff before said goods were sold to defendant."

This finding is clearly erroneous. These universal gear joints were offered for sale only once on the Special Offering C-286 (plaintiff's Exhibit No. 1). Acting Chief of the Automotive and Machinery Division, Burgoyne, testified that had it come to his attention that these universal gear joints were marine equipment, that they might have found some other way to advertise it, or advertise it in another offering. (R. 88.) It should be noted that the bids received on Offering C-286 (plaintiff's Exhibit No. 1) were not opened until 2 p.m., October 24, 1946, and that the sale to Appellee Jones was made on October 30, 1946 (R. 132). Assistant Deputy Regional Director Zanon testified that it would have not been necessary to sell the goods for less than scrap value. (R. 119.) In any event the finding that there was a reasonable test of the market of the goods was not material since the sale was unauthorized.

C. Finding of the Court that there was no substantial evidence to establish the value of the universal gear joints at the time of the sale and that the exact value of the goods was questionable and speculative was clearly erroneous.

Zanon testified that the gear joints contained a high percentage of brass or bronze and that the scrap value at the

time of the sale was $2260.00. (R. 109, 118.) Appellee Jones testified that he did not know the exact value of the goods at the time of the sale but he did know the approximate weight of the gears and the approximate worth of bronze and that the gears contained a high percentage of bronze. (R. 129, 130.) Appellee Jones set out in his complaint in the state court replevin action that the value of the gear joints was $31,000.00. He stated that value was determined from a catalog he had received from an Eastern firm advertising similar universal gear joints. (R. 153.)

The value of the gear joints was over $2200.00 at the time of the sale, if the goods were sold as scrap, and the value, sold as gear joints would be considerably more than scrap value. There was no contradictory evidence of the fact of this value.

D. The findings of fact, paragraph III, that the Government's agents made no mistake concerning the identity, nature or value of said universal gear joints was clearly erroneous.

Webb and Burgoyne testified that they had never seen the gear joints and were unfamiliar with marine equipment of this type. That they thought the gear joints were automotive equipment since they had been referred to the automotive division. (R. 68, 69, 86.) The fact that the scrap value alone was over $2,000 is indicative of a mistake by

those agents of the War Assets Administration negotiating with Appellee Jones and selling the universal gear joints with the other residue for $75.00.

D. The finding that the appellee did not have reason to know that plaintiff or its agents lacked authority to make said sale is clearly erroneous. (R. 35.) The testimony which was uncontradicted showed that no one dealing with appellee had authority to make the sale on the basis the universal gear joints were sold. (R. 158, 114-116, 124, 163.) It is settled law that all persons are charged with notice of limitation of Governmental agents' authority. (*Utah Power & Light Company v. United States,* 243 U. S. 389.)

CONCLUSION

For the foregoing reasons we respectfully submit that the lower court erred and this case should be reversed.

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United States Attorney
for the District of Oregon.

VICTOR E HARR,
GENE B. CONKLIN,
Assistant United States Attorneys.

APPENDIX

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended, 50 U. S. C. App., Supp. V, Secs. 1611-1646, are as follows:

SEC. 2. [50 U. S. C. App. Supp. V, sec. 1611.]

(h) To assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

* * * * * * * *

SEC. 3. [50 U. S. C. App. Supp. V, sec. 1612.] As used in this Act—(a) The term "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

(c) The term "disposal agency" means any Government agency designated under section 10 to dispose of one or more classes of surplus property.

(d) The term "property" means any interest, owned by the United States or any Government agency, in real or personal property, of any kind, wherever located, but does not include * * *

(e) The term "surplus property" means any property which has been determined to be surplus to the needs and responsibilities of the owning agency in accordance with section 11.

* * * * * * * *

(g) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protecting, insuring, storing, packing, handling, and transporting, and, in the case of property which is dangerous to public health or safety, destroying, or rendering innocuous, such property.

* * * * * * * *

SEC. 4. [50 U. S. C. App. Supp. V, sec. 1613.] Surplus property shall be disposed of to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * * * * * * *

SEC. 5. (a) [50 U. S. C. App. Supp. V, sec. 1614 (a).] There is hereby established in the Office of War Mobilization, and in its successor, a Surplus Property Board (hereinafter called the "Board"), which shall be composed of three members, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per annum. * * *

* * * * * * * *

SEC. 6. [50 U. S. C. App. Supp. V, sec. 1615.] The activities of the Board shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

* * * * * * * *

SEC. 9. (a) [50 U. S. C. App. Supp. V, sec. 1618.] The Board shall prescribe regulations to effectuate the provisions of this Act. In formulating such regulations, the Board shall be guided by the objectives of this Act.

* * * * * * * *

SEC. 10. (a) [50 U. S. C. App. Supp. V, sec. 1619 (a).] Except as provided in subsection (b) of this section, the Board shall designate one or more Government agencies to act as disposal agencies under this Act. In exercising its authority to designate disposal agencies, the Board shall assign surplus property for disposal by the fewest number of Government agencies practicable and, so far as it deems feasible, shall centralize in one disposal agency responsibility for the disposal of all property of the same type or class.

* * * * * * * *

SEC. 11. (a) [50 U. S. C. App. Supp. V, sec. 1620.] Each owing agency shall have the duty and responsibility continuously to survey the property in its control and to determine which of such property is surplus to its needs and responsibilities.

(b) Each owing agency shall promptly report to the Board and the appropriate disposal agency all surplus property in its control which the owning agency does not dispose of under section 14.

(c) Whenever in the course of the performance of its duties under this Act, the Board has reason to believe that any owning agency has property in its control which is surplus to its needs and responsibilities and which it has not reported as such, the Board shall promptly report that fact to the Senate and House of Representatives. Each owning agency and each disposal agency shall submit to the Board (1) such information and reports with respect to surplus property in the control of the agency, in such form, and at such reasonable times, as the Board may direct; (2) such information and reports with respect to other property in the control of the agency, to such extent, and in such form, as the Board may direct and as the agency deems consistent with national security.

(d) When any surplus property is reported to any disposal agency under subsection (b) of this section, the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the Board. Where the disposal agency is not prepared at the time of its designation under this Act to undertake the care and handling of such surplus property the Board may postpone the responsibility of the agency to assume its duty for care and handling for such period as the Board deems necessary to permit the preparation of the agency therefor.

(e) The Board shall prescribe regulations neces-

sary to provide, so far as practicable, for uniform and wide public notice concerning surplus property available for sale, and for uniform and adequate time intervals between notice and sale so that all interested purchasers may have a fair opportunity to buy.

* * * * * * * *

SEC. 15. (a) [50 U. S. C. App. Supp. V, sec. 1624.] Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: * * *

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

* * * * * * * *

SEC. 25. [50 U. S. C. App. Supp. V, sec. 1634.] A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned.

* * * * * * * *

The pertinent provisions of the Act of September 18, 1945, 59 Stat. 533, c. 368, secs. 1-2, 50 U. S. C. App. Supp. V, sec. 1614a-1614b are as follows:

> SEC. 1. There is hereby established in the Office of War Mobilization and Reconversion a Surplus Property Administration which shall be headed by a Surplus Property Administrator. The Administrator shall be appointed by the President by and with the advice and consent of the Senate and shall receive compensation at the rate of $12,000 per year. The term of office of the Administrator shall be two years.
>
> SEC. 2. (a) Effective at the time the Surplus Property Administrator first appointed under this Act qualifies and takes office, the Surplus Property Board created by section 5 of the Surplus Property Act of 1944 is abolished, all of its functions are transferred to, and shall be exercised by, the Surplus Property Administrator, and all of its personnel (except the members thereof), records, and property (including office equipment) are transferred to, and shall become, respectively, the personnel, records, and property of the Surplus Property Administration.
>
> * * * * * * * *
>
> (c) All regulations, policies, determinations, authorizations, requirements, designations, and other actions of the Surplus Property Board, made, prescribed, or performed before the transfer of functions provided by subsection (a) of this section shall, except to the extent rescinded, modified, superseded, or made inapplicable by the Surplus Property Administrator, have the same effect as if such transfer had not been made; but functions vested in the Surplus Prop-

erty Board by any such regulation, policy, determination, authorization, requirement, designation, or other action shall, insofar as they are to be exercised after the transfer, be considered as vested in the Surplus Property Administrator.

* * * * * * * *

The pertinent provisions of Executive Order No. 9689, 11 Fed. Reg. 1265 (1946) are as follows:

CONSOLIDATION OF SURPLUS PROPERTY FUNCTIONS

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are

hereby transferred, except as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the Chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration, the Office of War Mobilization and Reconversion,

the Reconstruction Finance Corporation, and the War Assets Corporation. All authorization, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment.

* * * * * * * *

[Title of District Court and Cause]

PRE-TRIAL ORDER

Pre-trial conference having been duly held on the..... day of December, 1947 before the Honorable Claude McColloch, judge of the above-entitled court, plaintiff appearing by Victor E. Harr, Assistant United States Attorney, and defendant appearing in person and by one of his attorneys, Thomas H. Tongue III; the following proceedings were had, to-wit:

AGREED FACTS:

The following admissions were made by the parties through their respective counsel:

1. This is a civil action brought by the United States and this Court has jurisdiction under 28 U.S.C., Section 41.

2. That during all times hereinafter named, the United States Maritime Commission was and at all times has been an Agency of the United States of America, and during all times hereinafter named, the War Assets Administration

is an Agency of the United States of America, duly established under Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944", and that the War Assets Administration as a disposal agent was provided for in Executive Order 9689, issued by the President on January 31, 1946, and published in Federal Register.

3. That heretofore and on or between May 29, 1946 and June 22, 1946, all as shown by plaintiff's Exhibit No. 2, certain Universal Gear Joints, described as Lots No. 27, 28, 29 and 30 in plaintiff's Pre-Trial Exhibit No. 1, were, by the owning Agency, United States Maritime Commission, duly and legally declared surplus property to the War Assets Administration, which said War Assets Administration undertook to dispose of said surplus property in accordance with the aforesaid Act of Congress and the regulations and orders promulgated thereunder. That various other items were likewise declared surplus property for disposal by said War Assets Administration and, as hereinafter stated, were offered for sale by the same special offering as said Universal Gear Joints.

4. That said Universal Gear Joints, together with the other aforesaid items, were listed by said War Assets Administration for disposition by the Automotive and Machinery Sales Division of said Administration and that at that time, said War Assets Administration was in possession

of a full and complete description of said joints and of said other items.

5. It was the practice of the War Assets Administration to cause to be issued and circulated "Special Offerings" to interested parties. In the instant case, the Advertising Section of the War Assets Administration circulated a special offering, designated herein as plaintiff's Pre-Trial Exhibit No. 1, to persons engaged in the automotive trade, to persons engaged in dealing with hardware, machinery, farm implements and in the purchase of metals for scrap, and to interested veterans who had placed their names of record; and that said Special Offering C-286 listed and described all surplus equipment, machinery and accessories therein advertised, and invited bids thereon.

6. That the said Universal Gear Joints, together with other equipment and parts, including both certain automotive equipment and parts and certain non-automotive machinery and parts, were thus listed in "Special Offering C-286", which was issued and circulated as aforesaid and in which said special offering the aforesaid gears were fully and completely described and were shown to be located at the shipyard of the Oregon Shipbuilding Corporation, but that no bids were received thereon from the persons to whom said special offering was issued and circulated. That the mailing card showing the classes of per-

sons to whom said special offering was sent is attached hereto as defendant's Exhibit Pre-Trial Exhibit No. 9.

7. That after various items thus offered in said Pre-Trial Exhibit No. 1 were disposed of there remained a residue of unsold items, to-wit, the items described in Lots Nos. 1, 2, 3, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32.

8. That thereafter, and on or about the 30th day of October, 1946, defendant herein made an inquiry of a salesman of the War Assets Administration as to whether or not there were any Jeep Motors for sale at said time by the War Assets Administration. The said salesman, referring to the aforesaid residue, informed defendant that there were available two Jeep Motors, but that to acquire same it would be necessary to purchase all of the items comprising the unsold residue of the aforesaid Pre-Trial Exhibit No. 1. That at that time both defendant and said representative of the War Assets Administration had in their possession the description of said goods as described in said special offering. After considerable discussion, defendant advised the said salesman that he would consider buying the unsold residue as aforesaid, if priced low enough; the said salesman then offered to sell all of said residual items to defendant for $75. That defendant agreed to buy said items at said price, and later paid said sum by check to the Cashier of War Assets Administration; that a Sales Memorandum, Form WAA-2a, designated herein

as plaintiff's Pre-Trial Exhibit 3, was later issued covering said purported sale and that thereupon, said War Assets Administration mailed to plaintiff [sic] a receipt for said check, designated herein as defendant's Pre-Trial Exhibit No. 10, and thereafter mailed to plaintiff a certain sales document, being Form WAA-1a, which contained certain conditions of sale stated thereon, all stated in defendant's Pre-Trial Exhibit No. 11; that thereafter defendant was allowed and permitted to take delivery of all of said items, except Lots Nos. 27, 28, 29 and 30, being the said Universal Gear Joints. That before delivery of said gears was made to defendant, and on or about November 12, 1946, the War Assets Administration and U. S. Maritime Commission refused delivery thereof to defendant.

9. That at or about the time of the filing of the complaint herein on September 26, 1947, plaintiff tendered to defendant the sum of $69.13, being that portion of the sale price for said alleged sale allotted to said Universal Gear Joints. That said tender was rejected by defendant and plaintiff has paid said sum into the registry of this court for defendant's use and benefit; that plaintiff has at all times retained the proceeds from the purported sale of the following delivered items purportedly sold to defendant at the time and under the circumstances hereinabove set forth:

one dump truck body (item 1), 12 brass plug coils

(item 2), 2 jeep motors (item 3), 104 King pins for trailer hitches (item 23), 3 Norgren lubricators (item 24), 3 spare parts for circulating pumps (item 25), 240 miter gears (item 26), and two chess wagons (items 31 and 32).

PLAINTIFF'S CONTENTIONS

1. That through inadvertence and mistake, the coding section of the War Assets Administration assumed that said Universal Gear Joints were automotive equipment and parts, and they were accordingly listed for disposition with the Automotive and Machinery Division of the War Assets Administration, whereas, in truth and in fact, said equipment was designed by the manufacturer thereof as Industrial Machinery, and it was so used generally and was unsuited for and incapable of being used as automotive Universal Gears or for any other automotive purpose.

2. That because the same were not automotive parts or equipment, readily known by men with automotive knowledge and experience by reading the technical description thereof in the said special offering, no bids were received from veterans or from men engaged in the automotive business and trade.

3. That the parties to the aforesaid transaction were mutually mistaken as to the nature and value of the Universal Gears, and there was an utter failure of meeting of minds in that neither plaintiff's agent nor defendant, at

said time and place were familiar with the items then offered for sale and particularly were not familiar with the said gears; that they had never seen the said gears, were unfamiliar with the value thereof in that they both believed the gears were of insignificant value; that both were of the mistaken opinion that the gears were automotive parts, whereas, in truth and in fact, the said gears were Industrial Machinery and were unsuited for and incapable of being used in automobiles; and further, that said gears in fact at said time had a retail price and declared value of $62,533.45 and that plaintiff theretofore had paid the said sum of said gears, and that at the time of the aforesaid sale the gears had a scrap value of $2,260.00.

4. That because of aforesaid, plaintiff alleges that there was a total failure of meeting of minds; both plaintiff and defendant were mutually mistaken as to an essential fact, to-wit: the nature and value of said articles; and further to permit said sale to be consummated would result in gross inequity and hardship.

5. That the United States Maritime Commission, upon becoming aware of the purported inequitable sale, withdrew said gears from the War Assets Administration.

6. If it is contended by defendant that he was fully familiar with the nature, use and value of the residual items of the special offering herein and particularly of the said Universal Gear Joints, then, in that event, plaintiff contends

that defendant also knew that plainitff's agent was ignorant of the nature, use and value thereof, as is more particularly set forth in preceding paragraphs of plaintiff's contentions herein, and with said knowledge defendant knew that the price quoted by said agent was grossly unfair and inadequate in comparison to the true and actual value of said items and that notwithstanding said knowledge by defendant and the known lack of knowledge of plaintiff's agent, defendant, by his acts, words and disarming conduct, misled plaintiff's agent to the loss and hardship to plaintiff and to his own inequitable and unconscionable gain.

7. It is further contended that plaintiff's sales representative making the purported sale exceeded his authority in that his delegated authority to execute contracts was to execute individual sales contracts not to exceed a declared value of $50,000. (War Assets Daily Bulletin No. A80, 9-23-1946, on Page 4, designated herein as Plaintiff's Pre-Trial Exhibit No. 5) and thereby said sale was void ab initio.

8. It is further contended that plaintiff's agent exceeded his authority in that the purported sale did not comply and was repugnant to the objectives of Public Law 457 of the 78th Congress, entitled "Surplus Property Act of 1944".

9. It is further contended that plaintiff did not authorize, approve or ratify said purported sale and that

plaintiff was not negligent in any respect that would preclude rescission of the contract herein.

10. It is further contended that by motion in the Multnomah County Circuit Court Case No. 174225, by defendants Mudge and Gibson therein, it was asserted that authority was lacking for the sale of the said gears.

11. It is further contended that defendant is charged with knowledge of the lack of authority of plaintiff's agent to consummate said purported sale.

12. It is contended by defendant and plaintiff admits that said gears were moved subsequent to institution of legal proceedings instituted in the Circuit Court by defendant herein against defendants Mudge and Gibson, but contends that said suit was against individuals and not binding upon plaintiff herein, as the United States had not consented therein to be sued, and further that defendant was not prejudiced by the moving of said gears as the said State court action was based on replevin and sought, as an alternative for the recovery of possession of the said property, a specified sum of money.

13. Plaintiff contends it took appropriate steps to notify defendant of its intention to rescind the alleged sale and to restore the defendant to status quo, and refers specifically to defendant's pre-trial Exhibit No. 18.

14. Plaintiff contends that any new matter raised in

plaintiff's amended complaint was not without previous knowledge to defendant and has not prejudiced defendant in the premises.

15. Plaintiff prays:

(1) That a decree be rendered in declaration of the rights and duties of the parties hereto under and by virtue of any agreement arising under the aforementioned transaction between plaintiff's agent, or agents, and defendant.

(2) That a decree be rendered declaring the purported sale to be void and plaintiff to be the owner of the aforementioned property purported to have been sold to the defendant.

(3) That a decree be rendered to vacate, set aside and rescind the aforementioned purported sale.

(4) That defendant be reimbursed in the sum of $75.00, $69.13 of which was heretofore tendered to defendant and by him rejected and then tendered into the Registry of the Court for defendant's use and benefit, and that all items delivered to defendant by plaintiff be restored to plaintiff: or, in the alternative, if defendant is put to a hardship to restore the parties to status quo by a re-delivery to plaintiff of the items delivered to him, then, if defendant so elects to retain all items delivered, defendant should be reimbursed in the sum of $69.13, the amount paid by him for the said Universal Gear Joints.

16. Plaintiff denies that said sale was at a price in accordance with a custom and practice established by plaintiff in similar sales and denies further that plaintiff established a custom of disposing of surplus war commodities at a fraction of their original cost when unsuccessful over a period of time in selling goods at a more substantial price, but to the contrary plaintiff contends it was the practice of War Assets Administration to comply with the requirement of the "Surplus Property Act of 1944".

DEFENDANT'S CONTENTIONS

1. In answer to plaintiff's contentions 1 and 2 defendant contends that both of plaintiff's said contentions are wholly immaterial to the issues herein and defendant further denies both of said contentions.

2. In answer to plaintiff's contentions 3 and 4 defendant denies the same and contends that both defendant and plaintiff's representative were familiar with the nature, use and value of said Universal Gear Joints; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that defendant was a bona fide purchaser for value; that with full knowledge of all of the facts as to the nature, use and value of said goods and of the price at which said goods were offered for sale to defendant, the War Assets Administration authorized, approved and ratified said sale; and that if any mistake was

made by plaintiff's representatives, which defendant denies, any such mistake was solely the result of their own negligence and not otherwise.

3. In answer to plaintiff's contention 5, defendant denies the same and denies that the United States Maritime Commission had power to withdraw said goods after said sale had been consummated.

4. In answer to plaintiff's contention 6, defendant denies the same and contends that plaintiff's representatives were fully aware of the nature, use and value of said Universal Gear Joints; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that defendant was a bona fide purchaser for value; that with full knowledge of all of the facts as to the nature, use and value of said goods and of the price at which said goods were offered for sale to defendant, the War Assets Administration authorized, approved and ratified said sale; and that if any mistake was made by plaintiff's representatives, which defendant denies, any such mistake was solely the result of their own negligence and not otherwise; that at the time of refusing delivery of said goods plaintiff's representatives made no claim that defendant had made misrepresentations of any kind or was in other than complete good faith; that no such claim was made by plaintiff at any time until less than three weeks before the trial of

said cause and that plaintiff is therefore estopped from alleging such grounds for rescission of said sale.

5. In answer to plaintiff's contentions 7, 8, 9, 10 and 11, defendant denies the same except for plaintiff's contention 10 and contends that defendant was a bona fide purchaser for value; that said sale was at a price in accordance with custom and practice established by plaintiff in similar sales; that with full knowledge of all of the facts as to the nature, use and value of said goods, of the price at which said goods were offered for sale to defendant, and of any and all grounds on which plaintiff now contends that said sale is void, the War Assets Administration authorized, approved and ratified said sale; that at the time of refusing delivery of said goods and at the time plaintiff's complaint was filed herein, plaintiff made no claim that the sale of said gear joints was void for lack of authority; that no such contention was made in this case until less than three weeks before the trial of said cause and that plaintiff is therefore barred and estopped from alleging such grounds for rescission of said sale; that at no time until four days before trial did plaintiff make any claim that said sale was void as to any items other than said gear joints and that plaintiff is therefore barred and estopped from attempting to rescind said sale as to any items other than said gear joints.

6. In answer to plaintiff's contention 12, defendant

denies the same, except that defendant contends, as hereinafter stated, that the removal of said goods by plaintiff's agents was with an intent to defeat the jurisdiction of the state court over said goods; that defendant was prejudiced by reason of the fact that in an action for replevin a plaintiff is entitled to the return of the goods themselves and is not obliged to accept damages in lieu thereof unless it is impossible for said goods to be returned.

7. In answer to plaintiff's contention 13, defendant denies the same and contends that there has never been any attempt by plaintiff's representatives to rescind said sale for any items other than said Universal Gear Joints; that the only grounds originally stated by plaintiff's representatives for the rescission of the sale of said gear joints was that said goods had by mistake been classified as automotive equipment and that said joints had subsequently been withdrawn by the United States Maritime Commission; that plaintiff is estopped from rescinding said sale as to any other items or on any other grounds.

8. In answer to plaintiff's contention 14, defendant denies the same.

9. In further answer to plaintiff's contentions defendant contends that all of the facts as to the nature and value of said Universal Gear Joints were fully available to both parties at the time of said sale; that thereafter, with full knowledge of said facts, plaintiff's agents, acting with

apparent and actual authority, accepted payment by defendant, issued Sales Documents designated herein as Defendant's Pre-Trial Exhibit 11, purporting to transfer to defendant title to said joints and delivered to defendant all of the items covered by said sale other than said Universal Gear Joints; that at the time of said sale, defendant was a bona fide purchaser of said goods for a valuable consideration and without notice of any alleged mistake or lack of authority on the part of plaintiff's representatives, or of their right to rescind said sale; that upon the institution by defendant of legal proceedings to recover possession of said Universal Gear Joints, plaintiff twice moved said joints out of the state with intent to defeat the jurisdiction of the Court in which said proceedings were instituted; that plaintiff took no action to rescind said sale or to restore defendant to the status quo until the filing of the complaint herein on or about September 26, 1947, at which time plaintiff offered to return to defendant the sum of $69.13 for said Universal Gear Joints, but has at all times and does still retain the benefit of and proceeds from the sale of all other items included in said sale of Octobet 30, 1946, and from the sale of all other items listed in Special Offering C-286; that the War Assets Administration in the Portland area has established a custom and practice of disposing of surplus war commodities at a small fraction of their original cost price when unsuccessful over a period of time in selling goods at more substantial prices; that the sale of said Uni-

versal Gear Joints was wholly in accordance with said established custom and practice; that plaintiff has been seriously prejudiced by the long delay in withholding delivery of said joints and the attempted recission of said sale; and that under the facts of this case plaintiff is barred and estopped from seeking to rescind said sale, either in whole or in part.

10. Defendant prays that said sale be held valid and binding in all respects; that plaintiff be declared the owner of all of the items involved in said sale and that the complaint herein be dismissed.

QUESTIONS TO BE DECIDED

1. Whether plaintiff's contentions 1 and 2 are material.

2. Whether the parties to said purported sale were mutually mistaken as alleged in plaintiff's contentions to allow plaintiff to rescind said purported sale.

3. Whether, if the Court finds there was not a mutual mistake, then was there such a unilateral mistake or was plaintiff's agent misled as alleged in plaintiff's contentions so as to entitle plaintiff to rescind said purported sale.

4. Whether the representative of the War Assets Administration making said purported sale had authority to sell said Universal Gear Joints and, if not, was said sale void *ab initio*.

5. Whether said purported sale was or could be later ratified by plaintiff.

6. Whether the United States Maritime Commission had authority to withdraw from the War Assets Administration said Universal Gear Joints after said purported sale had been consummated, and, if so, whether said withdrawal was effectively accomplished.

7. Whether, under the facts and circumstances of this case as set forth in defendant's contentions, plaintiff is barred and estopped from seeking to rescind the sale of said gear joints.

8. Whether plaintiff is barred and estopped from contending that defendant made any misrepresentations or was other than in good faith or that said sale of said gear joints was void for lack of authority, or that said sale was void for any reason as to any items other than said joints.

9. Whether the Court can properly consider the custom and practice established by plaintiff in similar sales and, if so, what was said custom and practice and was this sale in accordance therewith.

10. Whether defendant was a bona fide purchaser for value.

11. Should the rights of the parties be determined in any of the respects set forth in plaintiff's contention No. 15.

EXHIBITS

PLAINTIFF'S:

1. Special Offering No. C-286.
2. A to D, inclusive, Forms SPB1, declaration of surplus property.
3. A to I, inclusive, Forms WAA2a, sales memoranda.
4. A to I, inclusive, Forms WAAa.
5. Bulletin No. 80, dated 9/23/46, entitled "Daily W.A.A. Bulletin".
6. A to D, inclusive, Universal Gear Joints.
7. (Reserved) Form SPB 1.1, Withdrawal Form.

DEFENDANT'S:

8. (Reserved) A to ...., inclusive, Forms WAA2a for other items included in Special Offering No. C-286.
9. For 1121, Mailing Card.
10. Receipt.
11. A to I, inclusive, Forms WAA1a for all items sold to defendant.
12. Pleadings in Circuit Court, Multnomah County, Case No. 174225, Jones v. Mudge, et al.:
    (a) Complaint.
    (b) Motion to Dismiss.
    (c) Order Denying Motion and Allowing Filing Amended Complaint.
    (d) Motion to Make Definite and Certain.
    (e) Order Allowing Motion to Make Definite and Certain.
    (f) Amended Complaint.
    (g) Answer.
13. Deposition of C. T. Mudge, D. M. Gibson and S. M. Buffett in said Case No. 174225.
14. Deposition of William J. Burgoyne herein.

15. Deposition of Delbert W. Webb and Louis A. Zannon.
16. Memorandum dated 3/13/47 to S. M. Buffett.
17. Shipping Notice dated 3/13/47.
18. Letter dated 12/4/46 from C. T. Mudge to Neal W. Bush.
19. Universal Joint, sample of automotive joint.
20. Three roller bearings.
21. (Reserved) A to ...., inclusive, Forms WAA-2 for goods sold between 9/1/46 and 1/1/47 to Ziddell Mach. & Supply Co., Barde Steel Co., Calif. Bag and Metal Co., and Schnitzer & Wolfe Mach. Co.
22. Pleadings in this case.

Plaintiff objects to defendant's Pre-Trial Exhibits 8, 10, 12, 16, 17, 19, 20 and 21 on the ground that the same are irrelevent and immaterial and will not aid in the proof or disproof of any of the issues involved in this case.

Defendant objects to plaintiff's Pre-Trial Exhibits 2, 3, 4, 5, and 7 on the ground that the same are irrelevent, immaterial and incompetent and not the best evidence.

CONCLUSIONS

The foregoing is the Pre-Trial Order agreed upon at a conference between counsel and the Court. It shall not be amended at the trial except by consent of counsel or to prevent manifest injustice. It supersedes the pleadings, which now have no effect in this case.

The foregoing Pre-Trial Order is hereby approved and settled.

Dated this.....day of....., 1948.

District Judge

APPROVED:

Of Attorneys for the United States

Of Attorneys for Defendant